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No. 91-1716

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANICE J. JERABEK, JEANNE MAHAN,
DIANNE FOSTER,
Petitioners,

v.

AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

The California statutes governing public sector labor relations permit certain public employers and the labor organizations chosen by those employers' employees as exclusive bargaining representatives to negotiate an agency fee or "fair share" fee agreement. Cal. Gov. Code §§ 3515.7; 3540.1.[1]

This Court, in a series of cases, has ruled that such statutes are constitutional so long as nonmember employees, on stating an objection, are not required to contribute toward union expenditures for political, ideological and other similar non-collective bargaining activities.

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[1] Such agreements, of course, require the employees in an appropriate collective bargaining unit who choose not to be members of the labor organization to pay a designated fee not to exceed the dues paid by members.

See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Assn.*, —— U.S. ——, 111 S.Ct. 1950 (1991).

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), the Court added that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

In response to the *Hudson* decision, the California Public Employment Relations Board ("PERB") began what became a two-year process of drafting regulations to assure compliance with the *Hudson* procedural requirements by the labor organizations within the Board's jurisdiction. After PERB had heard the views of numerous labor organizations, public employers, public employees, and such organizations as the National Right to Work Legal Defense Foundation—currently representing petitioners in this case—the Board issued comprehensive "Agency Fee Regulations."

The PERB regulations, as here pertinent, provide:

- that each nonmember employee in a collective bargaining unit covered by an agency fee agreement shall receive an annual written notice from the labor organization acting as the unit's exclusive representative specifying the amount of the agency fee payable by nonmembers, the basis for its calculation, and the procedure for objecting to the amount of the fee (Cal. Code Regs. tit. 8, § 32992 (a) (1989));
- that each such labor organization shall permit nonmembers to object to the amount of the agency fee up to thirty days after receiving the mandatory notice, and shall, if such objection is filed, provide a prompt, cost-free hearing before an impartial

decisionmaker, with the results announced within thirty days of the hearing (Cal. Code Regs. tit. 8, § 32994); and

- that pending the resolution of any such objections, levied fees must be held in an escrow account, and not spent for any purpose by the labor organization (Cal. Code Regs. tit. 8, § 32995).

On appeal, these regulations were upheld in their entirety by the Court of Appeal of the State of California, Third Appellate Division. The Supreme Court of the State of California then denied a petition to review the Court of Appeal decision.

ARGUMENT

The *certiorari* petition raises an exceedingly technical, highly abstract question in a context that so far as we can ascertain is *sui generis*. That question was correctly decided below. There is no basis for this Court's review.

1. The petitioners challenge only a single aspect of California PERB's comprehensive regulations implementing this Court's *Chicago Teachers Union v. Hudson* decision: the provision that permits unions *either* to provide the requisite explanation of the basis for an agency fee to nonmember fee payers thirty days *before* collecting the first agency fee in *any given fee year*, *or* to provide the notice *concurrently* with the first fee collection of the year, provided that "all agency fees so noticed shall be held in escrow in toto until all objectors are identified." Cal. Code Regs. tit. 8, § 32992(c)(2) (emphasis added).

As they are at pains to point out, petitioners do *not* contend that a *Hudson* notice provided 30 days before first collection is invalid or that the holding of the entire agency fee in escrow pending identification of objectors is invalid, but *only* that a notice contemporaneous with first collection is *per se* invalid.[2] And, petitioners contend

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[2] *See* Petition for a Writ of *Certiorari* ("Pet."), at 8 nn.8 & 9 ("Jerabek never challenged the regulations' escrow requirements

that *Hudson* requires the conclusion they advocate. That contention rests on a misreading of the opinion and a studious refusal to confront its logic.

Petitioners rest their invocation of *Hudson* on one sentence from that opinion: that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. These words simply do not say what petitioners seek to make them say.

Hudson in no way indicates that, as a matter of time sequence, these three procedural "requirements" must all be completed *before* any fee collection can take place. Indeed, it is quite clear from the *Hudson* opinion as a whole that the first of the two requirements *not* challenged here—a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"—will *not* be completed before any fees are collected, but afterwards. *See* 475 U.S. at 309-310. And the requirement of "an escrow for the amounts reasonably in dispute while such challenges are pending," by its nature, is an exclusively post-collection requirement. *Id.*

At least equally to the point, *Hudson* makes clear that the purpose of the notice requirement is to assure that "potential objectors are given sufficient information to gauge the propriety of the union's fee" so that they can make a knowledgeable decision as to whether to object to paying for union non-collective bargaining expenditures, or to challenge the union's calculation of chargeable expenditures. *See* 475 U.S. at 306. And, the PERB rule—that notice is to be provided *a reasonable period before*

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or the unions' use of nonmembers' funds. . . . [S]ince escrow is required, escrow was not an issue before the court of appeal. . . .").

any objection must be lodged—fully vindicates the purpose of providing the fee payer "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." 475 U.S. at 303. In contrast, *no* purpose would be served by insisting upon a pre-collection notice when the relevant time for objecting to the amount of the fee and the time for holding a hearing on those objections both occur well *after* the first of a series of fee collections that will take place over a fee year.[8]

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[8] The propriety of a pre-collection notice, standing alone, has nothing to do with any "rebate" issue. *Cf.* Pet. 7. It is true, of course, that if labor organizations *must* provide objectors with an advance reduction of agency fees, and may not, instead, avoid temporary subsidization of political and ideological expenditures by a brief escrowing of funds, then as a practical matter the notice would have to be provided in time to insure that the labor organization would not collect, even for placement into escrow, an amount greater than the organization is legally permitted to assess nonmembers.

But, as noted above, petitioners insist that they are *not* raising any advance reduction issue, or challenging the escrow alternative; indeed, they chide the Court of Appeal for treating with those issues in its opinion. Pet. 8 nn. 8 & 9. Thus, petitioners are *not* raising the issues presented in cases such as *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990), *cert. dismissed*, 112 S.Ct. 633 (1991), and those discussed *infra* n.7, p. 9.

Petitioners' unwillingness to challenge the Court of Appeal's conclusion concerning the propriety of the escrow procedure is well-advised. As the state court noted, *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984), holds that unions may not exact and *use* union dues and then provide a later rebate. *See* Pet. App. 6a-7a. At the same time, *Ellis* expressly determined that *either* "advance reduction of dues *and/or interest-bearing escrow accounts*" are "acceptable alternatives" to the impermissible rebate system, since both avoid union expenditure of objectors' fees for nonchargeable purposes. 466 U.S. at 444 (emphasis supplied), *quoted at* Pet. App. 7a. Nothing in *Hudson* purports to overrule this explicit statement in *Ellis*.

As the Court of Appeal also noted, there is no basis for positing a separate First Amendment interest in retaining use of the (temporarily) exacted fees for the fee payers' own expressive purposes, since " 'if this argument were accepted, every suit for money against

Hudson, moreover, reaffirms that the overall "objective" of the law regulating agency fee agreements "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (quoting *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 237). As PERB recognized, and for the reasons we develop in the margin, a rigid pre-collection notice requirement would defeat this objective.[4]

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a party acting under color of governmental authority would automatically become a First Amendment case.'" Pet. App. 12a (*quoting Grunwald v. San Bernardino City Unified School Dist.*, 917 F.2d 1223, 1231 (9th Cir. 1990) (Kozinski, J., dissenting), *petition for rehearing granted and opinion withdrawn* June 9, 1992). *See also Arcara v. Cloud Books*, 478 U.S. 697, 705-06 (1986).

Lest we be misunderstood, we hasten to note that even if an "advance reduction" *were* required—and even if the "advance reduction" issue were presented here—it still would not follow that notice must precede the *first monthly collection of agency fees in each fee year*. Under the PERB regulations and under *Hudson*, agency fees typically are computed on an annual basis. *See* 475 U.S. at 307 & n.18. Hence, providing notice sufficiently early in the year to ensure that all objections would be resolved before the labor organization had collected more than the chargeable amount *for the year* satisfies any advance reduction requirement that may obtain. And notice contemporaneous with the first monthly collection is normally more than sufficient to meet this rule.

[4] In school districts, for example, the vast majority of newly hired teachers begin a ten-month employment simultaneously in September, following which it takes approximately one month for the labor organization to determine who the new teachers are and who among them chooses to be a fee payer rather than a union member. Consequently, if fee collection could not begin until after notice were given to fee payers, there could be a substantial delay in collection (thus requiring greater monthly payments by the fee payer once collection began). And, because many school systems require that payroll deductions of due and fees be in a uniform amount for all teachers, as a practical matter the labor organization might have to delay not only the collection of agency fees, but the collection of membership dues as well. Such a pre-collection notice requirement

2. Nor is it the case, as petitioners maintain, that a pre-collection notice is necessary because "pre-deprivation notice is the usual constitutional requirement." Pet. at 7 (citing general procedural due process cases).

For one thing, *Hudson* analyzed the constitutionality of agency fee procedures from a different perspective and therefore explicitly disavows reliance on the general procedural due process cases. 475 U.S. at 304, n.13. For a second, the procedural due process cases do not in any event support petitioners.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). As we have noted, *Hudson* makes clear, and petitioners do not dispute, that the required agency fee hearing is to be conducted well after the collection of fees has begun. *See* 475 U.S. at 309-310.[5] Accordingly, notice need not precede the first monthly collection of fees in order "to apprise the affected individual of, and permit adequate preparation for, [the] impending hearing.'"

3. Petitioners' suggestion that a grant of *certiorari* is necessary to resolve a conflict between the decision below

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would thus undermine the state interests that animate the agency fee system. And, it is unlikely in the extreme that the fee payers' interests will be served if, as a consequence of such a requirement, they must pay a year's worth of fees in a foreshortened period.

[5] This aspect of *Hudson* comports with "the usual rule," *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 603 (1974), that *post*-deprivation notice and hearings constitute "such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also*, approving the taking of liberty or property without advance notice, *Mackey v. Montrym*, 443 U.S. 1, 19 (1979); *Dixon v. Love*, 431 U.S. 105, 109 (1977); *Ingraham v. Wright*, 430 U.S. 651, 678-79 (1977).

In those few instances in which pre-deprivation notice has been required, a pre-deprivation *hearing* of some kind was required as well. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

and those of several federal courts of appeals on the necessity of a pre-collection notice in the agency fee context is wholly unconvincing.

Preliminarily, this Court's Rules do not speak of a conflict between a state intermediate appellate court and federal appellate courts as a basis for granting *certiorari*. The rules refer to a conflict involving the State's "court of last resort." Supreme Court Rules, Rule 10.1(a). Here, California's "court of last resort"—the California Supreme Court—did not grant review of the Court of Appeal's decision, and has not spoken itself on the issue here presented. Pet. App. 19a.

There is, in any event, *no* federal appellate opinion addressing—much less upholding—petitioners' claim here: that a pre-collection notice of the basis for an agency fee is required *even though an advance reduction in the amount of the fee is not required.*

The Ninth Circuit's opinion in *Grunwald v. San Bernardino County Unified School Dist.*, *supra*, upon which petitioners most heavily rely, has been withdrawn since the *certiorari* petition was filed.[6] Obviously, there is no need to grant *certiorari* to resolve a conflict with an opinion that no longer exists. And, while *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), does hold that a pre-collection notice is required, that holding was the necessary corollary of *Tierney*'s earlier conclusion, *disavowed by petitioners here*, that an advance reduction of agency fees is also required. *See id.* at 1502-03. Nothing in *Tierney* indicates that the Sixth Circuit would hold that a pre-collection notice is necessary *even though* no pre-collection objection and advance reduction are

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[6] The *Grunwald* opinion was withdrawn by a 2-1 vote of the panel that had decided the case. The panel announced that "[a] new opinion will be filed." Order of June 9, 1991.

contemplated. And for the reasons indicated above, pp. 3-7, such a conclusion lacks any logical justification.[7]

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[7] The other three "conflict" cases cited by petitioners are even further afield.

Dashielle v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) concerned only the "narrow issue . . . whether the segregating function, by which expenses are allocated into the nonchargeable and chargeable categories, must be audited by an independent accountant." 925 F.2d at 754. While the Fourth Circuit indicated, in passing, that the notice containing the audit must be given in advance of fee collection, that issue was not squarely before the Court. Further, the Fourth Circuit's comments assumed, like *Tierney*, that an advance notice is *not* an independent requirement but one contingent upon an advance fee reduction requirement. 925 F.2d at 756.

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990) concerned not agency fees but compulsory bar dues, and in any event only briefly mentioned an advance notice as "*one* way for an objection procedure to work," *id.* at 635 n.22, not the only way.

Finally, *Galda v. Bloustein*, 686 F.2d 19, 168 n.16 (3d Cir. 1982), again was not decided in the agency fee context, and explicitly left open the question of its application in that context. Further, the supposed holding petitioners rely upon is a "*cf.*" quotation from a secondary source, and is, once again, addressed primarily to the advance reduction issue.